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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE DA VINCI SURGICAL ROBOT ANTITRUST LITIGATION This Document Relates to: ALL ACTIONS.	Lead Case No. 3:21-cv-03825-AMO **DEFENDANT'S RESPONSE TO PLAINTIFFS' STATEMENT OF RECENT DECISION** The Honorable Araceli Martínez-Olguín

On June 18, 2024, Plaintiffs submitted a Statement of Recent Decision—Judge Thompson's June 17, 2024 decision in *Lambrix* v. *Tesla, Inc.*, No. 3:23-cv-01145 ("*Lambrix II*"), which reverses Judge Thompson's earlier decision and holds that, where a plaintiff establishes market power in the foremarket, it does not have to satisfy the four factors for proving single-brand aftermarkets established by the Ninth Circuit in *Epic, Inc.* v. *Apple, Inc.*, 67 F.4th 946 (9th Cir. 2023). *See* Dkt. 276, 276-1.

Plaintiffs are wrong in asserting that *Lambrix II* "squarely addresses Intuitive's argument in support of its motion for reconsideration of this Court's grant of partial summary judgment in Plaintiff's favor." Dkt. 276 at 1:10-11. As set forth in Intuitive's reply brief, the primary thrust of Intuitive's Motion for Reconsideration is that, given the Court's ruling *denying* summary judgment for Plaintiffs on market definition and power as to the primary market, Plaintiffs have *not* established a separate, single-brand aftermarket under their own (erroneous) view of the law. Dkt. 271 at 1-2. As Intuitive argued, the Court should grant reconsideration "[o]n that basis alone." *Id.* at 2:2. If the separate issue raised by *Lambrix II* is not mooted by developments in this case or clarified by additional Ninth Circuit authority, whether to follow *Lambrix II* should be deferred until a later date with the benefit of full briefing and argument.

Should that occasion arise, Intuitive looks forward to showing that Judge Thompson got it right the first time and that her recent decision conflicts with the Ninth Circuit's decision in *Coronavirus Reporter* v. *Apple, Inc.*, 85 F.4th 948 (9th Cir. 2023), which applied the *Epic Games* factors to dismiss a complaint even though the plaintiff alleged a monopoly in the foremarket. *See* Dkt. 271 at 3:3-7. Moreover, allowing single-brand aftermarkets whenever the plaintiff establishes market power in the tying market would revolutionize tying law. In every tying case, the plaintiff must prove market power in the tying market. *Illinois Tool Works* v. *Independent Ink*, 547 U.S. 28, 46 (2006). The *Lambrix II* ruling would turn proof of that element into an automatic dispensation from proving another required element—a relevant market for the tied product. In any event, *Lambrix II* does not affect Intuitive's pending Motion for Reconsideration, and this Court may never need to reach the separate issue it addresses.

Dated: July 30, 2024

By: /s/ *Kenneth A. Gallo*
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